IN THE

Supreme Court of the United States

No. 396

ROBERT F. BUGGS, Petitioner,

vs.

FORD MOTOR COMPANY, a Foreign Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDGAR B. TOLMAN, of Chicago, Ill.
Attorney for Petitioner Robert F. Buggs.

JACOB GEFFS, of Janesville, Wis.
Of Counsel.

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ROBERT F. BUGGS, Petitioner,

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert F. Buggs respectfully prays that a Writ of Certiorari issue to review a judment of the Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court of the United States for the Western District of Wisconsin which judgment dismissed petitioner's action against the respondent.

Summary Statement of the Matter Involved.

Petitioner, a resident of Rock County, Wisconsin, began an action at law in the Circuit Court of that county against respondent to recover damages for the unlawful cancellation of a franchise or license to act as a Ford dealer in Janesville, Wisconsin and surrounding territory (R pages 12-17). The petitioner alleged that he had held a Ford dealer franchise in the above territory since October, 1913; that the franchise had been renewed from time to time; that he had equipped his garage to handle efficiently this agency and had expended $7,600 in building a warehouse necessary for the assembling of Ford cars; that he had purchased Ford parts, expended money and effort in building up Ford trade upon the assurance and belief that he would have a permanent business; that he had put in over twelve hours a day in the work and had expended over $100,000 in building up the business; that upon September 27, 1937 the respondent unlawfully and in violation of Section 218.01 of the Wisconsin Statutes cancelled his franchise and prayed for damages, compensatory and punitive, in the amount of $150,000 (R. pages 12-17).

The Statute above referred to became effective July 14, 1937 and provides, among other things, for the suspension of revocation of a license of a manufacturer "who has unfairly, without due regard to the equities of said dealer and without just provocation, cancelled the franchise of any motor vehicle dealer." (R. p. 120). A copy of the statute is attached hereto as Appendix A.

Upon the respondent's request the action was removed to the United States District Court for the Western District of Wisconsin. (R. pages 2-12)

The respondent answered alleging among other things

that the Statute was unconstitutional; that it was not applicable to the parties; and that the parties had entered into a Sales Agreement (R. pages 41-46) on May 26, 1932, which governed the rights of the parties. (R. pages 17-25)

The petitioner replied admitting the execution of the Sales Agreement but denying its validity on the ground that it lacked mutuality. (R. Pages 49-54)

On the respondent's motion the District Court dismissed petitioner's action and held that the Sales Agreement was a valid contract and governed the rights of the parties (R. Pages 98-107). The petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, and that court affirmed the judgment of the District Court. (R. Pages 120-126)

Reasons Relied on for the Allowance of the Writ.

A.

The decision of the Circuit Court of Appeals in holding that a sales agreement which gives the respondent (the seller) the power to fix the price to be paid by the petitioner (the buyer) is a valid contract is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit on the same matter, in the case of *Ford Motor Company* vs. *Kirkmyer Motor Company*, 65F. (2d) 1001.

B.

The decision of the Circuit Court of Appeals in holding that a sales agreement which gives the seller the arbitrary power to fix and change prices at will, is a valid contract, is a decision of an important question of local law and is in conflict with applicable local decisions.

C.

The decision of the said Circuit Court of Appeals is untenable and in conflict with the authorities.

THEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case; that the judgment of said court may be reversed, and that your petitioner have such other and further relief in the premises as to your Honorable Court may seem meet and proper.

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Attorney for Petitioner

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Of Counsel

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinion Below.

The opinion in the Circuit Court of Appeals (R. Pages 120-125) is reported in (not yet published in official reporter).

II.

JURISDICTION

Jurisdiction of this court is invoked under Section 240 (A) of the Judicial Code, as amended, by the Act of February 13, 1925, (28 U.S.C.A. 347), and Section 262 of the Judicial Code (28 U.S.C.A. 377).

The judgment of the Circuit Court of Appeals affirming the judgment below was entered June 28, 1940.

III.

STATEMENT OF THE CASE

A sufficient statement of the case is included in the petition.

IV.

Specification of Error Intended to Be Urged.

1. The Circuit Court of Appeals erred in affirming the judgment below.

V.

ARGUMENT

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR

THE FOURTH CIRCUIT, ON THE SAME MATTER, IN THE CASE OF *FORD MOTOR COMPANY* VS. *KIRKMYER MOTOR COMPANY*. 65F (2d) 1001.

2. THE DECISION IS IN CONFLICT WITH LOCAL LAW AND IN CONFLICT WITH LOCAL DECISIONS.

3. THE DECISION IS UNTENABLE AND IN CONFLICT WITH THE AUTHORITIES.

This case involves the rights of Wisconsin automobile dealers under Chapter 218 of the Wisconsin Statutes, which we have set forth in Appendix A. The purpose of the Statute was and is to protect the business and investment of Wisconsin citizens from being arbitrarily destroyed by the manufacturer. The Statute became effective July 14, 1937, and was applicable to the parties at the time the petitioner's cause of action arose; namely, the date of the attempted cancellation of his franchise, on September 27, 1937. This stands admitted on the record. The petitioner alleges in paragraph 2 of his complaint (R. pages 12-13) that he is a licensed automobile dealer under Chapter 218 of the Wisconsin Statutes and has been since January 10, 1936. The respondent admits in its answer that "it (the respondent) has duly complied with Chapter 218 of the Wisconsin Statutes for 1937." (R. Pages 17-18). The question before the court below was: Did the wilful violation of a positive statutory duty by the respondent, which resulted in damage to the petitioner, a member of a class intended to be protected by the Statute, give rise to a civil action for damages? The petitioner contended that it did under the authorities of *Texas & N.O.R. Co. et al. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 50 S. Ct. 427; *Couch*

v. Steel, 3 El. & Bl. 402, 118 E.R. 1193 (1854); and *Judenine v. Benzies—Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295, 106 A.L.R. 1443.

The decision below does not dispute this proposition of law, but denies the petitioner the protection of the Statute on the ground that the Statute was circumvented by the Sales Agreement signed in 1932. On page 125 of the Record the court below stated:

> "We are convinced that the legislation did not intend to make its legislation, nor did the legislation, by its own terms, apply to and include existing contracts."

In other words the public policy established by the Statute of Wisconsin is circumvented by prior Sales Agreement, (R. pages 41-46), identical in effect to one which the Circuit Court of Appeals for the Fourth Circuit in the case of *Ford Motor Company v. Kirkmyer Motor Co.* 65 F. (2d) 1001, declared to be a nullity for lack of mutuality. Furthermore, as above pointed out, it is admitted by the Record that this Statute was applicable to both parties *at the time of the alleged wrongful act* on the part of the respondent.

The first proposition that the decision below is in conflict with the law as established by the Fourth Circuit Court of Appeals in the case of *Ford Motor Company v. Kirkmyer Motor Company*, 65 F. (2d) 1001 is admitted by the court below. On pages 123-125 of the Record the court stated:

The legal questions are:

1. Is the Wisconsin statute (Wis. Stats. 218.01 (3) (17)) valid? Is it retroactive?

2. Is one aggrieved by the inexcusable cancellation of

his dealer's contract entitled to maintain an action for damages because of this statute which provides for cancellation of the manufacturer's right to do business in the State of Wisconsin in case it inexcusably and unjustifiably cancels a dealer's agreement?

3. Was the last written agreement between plaintiff and defendant invalid because unilateral?

4. If invalid, were there valid contractual obligations binding on the parties on September 22, 1937, which made applicable the aforesaid Wisconsin statute?

Most sharply controverted is the question of the validity of the contract. Plaintiff contends that it lacks mutuality. In short, it is unilateral.

An examination of its terms, which are many, indicates that it was dictated by the manufacturer at Detroit, and drawn by its counsel with the avowed purpose of protecting the manufacturer to the utmost and granting, if any, few rights to, and the smallest possible protection of, the agent.

It is one which affords some support for the wisdom and the necessity of legislation which protects the weak against a strong party in situations like the instant one. The terms of this and other similar agreements had, no doubt, a casual bearing upon the passage of the legislation which the State of Wisconsin enacted in 1937. It cannot be ignored in considering the validity of such legislation.

Similar contracts have been before the courts on many occasions, and there are numerous decisions, entitled to weight and respect, which hold these contracts to be void for lack of mutuality. The case which most strongly supports plaintiff's position is Ford Motor Company v. *Kirkmyer Motor Co.*, 65 F. (2d) 1001, a decision by the Circuit Court of Appeals of the Fourth Circuit. This

decision in turn relies on *Huffman* v. *Page-Detroit Motor Car Co.*, 262 Fed. 116. Likewise, two decisions of this court, *Velie Co.* v. *Kopmeier Co.*, 194 Fed. 324, and *Oakland Motor Car Co.* v. *Indiana Auto. Co.*, 201 Fed. 498, join in condemning agreements which are loaded with express obligations of one side and silent as to the obligations of the manufacturer. *Jordan* v. *Buick Co.*, 75 F. (2d) 447, is another case (by this court) which followed the above-cited cases, and found the agreement there set forth to lack mutuality. Cited below are many cases which contain discussions of this question.*

Such disagreement as seemingly exists in the decisions may be partly attributed to the differences in the terms of the agreements under attack.

We are convinced that the agreement before us is not unilateral and is valid.

Going at once to the most important paragraphs of the contract and the ones upon which defendant must chiefly rely to support its contention that the agreement is valid, we find the following:

"(1) Company agrees to sell and Dealer agrees to purchase Ford automobiles, * * * accessories and parts (hreinafter sometimes collectively referred to as Company's 'Products') upon the terms, conditions and provisions hereinafter specifically set forth and subject to the right reserved to Company to sell to other Dealers and direct to retail purchasers in any part of the United States without obligations for any commission to Dealer on any such sale.

"(2) Company will sell its products to Dealer f.o.b. Detroit, Michigan, at such net list price, or at such discounts from published list prices as are from time to time fixed by Company. * * *

"* * *

"(5) 'List Prices' of all Ford products shall be subject to change at any time and from time to time without obligation on Company to adjust with Dealer as to price of any product shipped, or paid for but not in transit, at the time such price change becomes effective.

"* * *

* *Chevrolet Motor Co.* v. *McCullough Co.*, 6 F.-(2d) 212; *Freiburger* v. *Texas Co.*, 257 N. W. 592 (Wis.); *Erskine* v. *Chevrolet Motor Co.*, 185 N. C. 479; *Bendix* v. *Staver Co.*, 174 Ill. App. 589; *Chevrolet Co.* v. *Gladding*, 42 F. (2d) 440; 32 A. L. R. 209; *Ken-Rad Corp.* v. *Bohannan*, 80 F. (2d) 251; Casae Note, 45 Harvard Law Review, page 378; Williston on Contracts, Sec. 1027 A; *Bliss Furn. Co.* v. *Norris*, 129 Mich. 11, 87 N. W. 1041; *Wilkinson* v. *Heavenrich*, 58 Mich. 574, 26 N. W. 139; *Bastian* v. *J. H. D. P. Co.* 261 Mich. 94, 245 N. W. 581; *Motor Car Supply Co.* v. *Gen. Household Utilities Co.*, 80 F. (2d) 167, 170; *Brooks* v. *Fed. Surety Co.*, 24 F. (2d) 884, 57 A. L. R. 745; *E. I. Du Pont Co.* v. *Claiborne-Reno*, 64 F. (2d) 224; *Ellis* v. *Dodge Bros.*, 246 Fed. 764.

"(9) It is further mutually agreed that:

"Estimates

"(a) Dealer will furnish Company on Company forms, prior to December 31st of each year, an estimate of the number of Ford automobiles, trucks, cabs and chassis that Dealer will purchase from Company during each month of the succeeding year. Company agrees to give careful consideration to such estimates, but expressly reserves the right to follow or depart from such estimates according to its discretion. Company shall in no way be liable for any delay in shipments, however caused, nor for shipments over other than specified route.

"* * *

"(c) This agreement may be terminated at any time at the will of either party by written notice to the other party given either by registered mail or by personal delivery, and such termination shall also operate to cancel all orders theretofore received by Company and not delivered.

"* * *

"(e) This is a Michigan Agreement and shall be con-

strued according to the laws of the State of Michigan. If any provision of this agreement is held to be invalid or unenforceable, this contract shall as to such provision be considered divisible and the balance of the agreement shall be valid and binding."

For appellant it is contended that the agreement to sell does not definitely specify the prices at which the product would be sold. Moreover, he argues that the contract was terminable at any time.

Vital and determinative are paragraphs 1 and 2. The first obligates defendant to sell, but upon "terms, conditions and provisions hereinafter specifically set forth." These conditions and terms are set forth in paragraph 2, which provides defendant "will sell its products to plaintiff f.o.b. Detroit, Michigan at such net list price, or at such discounts from published list prices as are from time to time fixed by Company." This seems, under the authorities and on reason, sufficiently definite.

The parties had been dealing with each other prior to the execution of the last contract. They knew of the practices of each other. The dealer knew that automobiles were redesigned and new models appeared yearly and as a result prices changed at least seasonally. Defendant's business was nationwide and its agents were many. It was to this known situation that the conract referred. The parties negotiated with a background of past dealings and mutual knowledge of the practices of the trade. "The net list prices and discounts from published list prices" appearing in paragraph 2 were well known to both parties. These net list prices and published list prices were the same to all dealers. They changed as necessity required. They were not lacking in definiteness, but provided a method whereby the prices could be definitely ascertained at any time.*

Having reached the conclusion that the agreement was valid and binding and therefore subject to cancellation by either party upon the giving of written notice, the only remaining question is the effect of the Wisconsin statute upon such an existing contract.

We are convinced that the legislature did not intend to make its legislation, nor did the legislation, by its own terms, apply to and include existing contracts. We must give to it a construction which will avoid a successful attack on its unconstitutionality. Our conclusion is, therefore, that the Wisconsin statute in question did not apply to, or effec, exisitng valid contracts such as the one here in question.

It becomes unnecessary for us to consider the two other difficult and vexatious questions which appellant has raised.

The judgment is

AFFIRMED.

• *Ken-Rad Corp.* v. *Bohannan*, 80 F. (2d) 251; *Memphis Furniture Co.* v. *Wemyss Co.*, 2 F. (2d) 428; *Moore v. Shell Oil Co.*, 2 Pac. (2d) 216; *Moon Motor Car Co.* v. *Moon Motor Car, Inc.*, 29 F. (2d) 3.

(Italics ours)

An examination of the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Ford Motor Company* vs. *Kirkmyer Motor Company*. 65F. (2d) 1001 reveals that exactly the same Sales Agreement was involved and the court reached exactly the opposite conclusion from the decision at bar. The question is: Is a Sales Agreement valid which gives the manufacturer sole authority to fix the price, to change it at any time, and which confers no legally enforceable right on the dealer? We contend that it is void for lack mutuality. The decisions of the Circuit Court of Appeals are in conflict on this question.

We contend further that the question is one of vital importance. It is more than a mere conflict of views on a particular set of facts. If the decision below stands it means (1) that agents and dealers, regardless of their equities, can be held to unconscionable contracts which in the words of the court below are

> "dictated by the manufacturer at Detroit, and drawn by its counsel with the avowed purpose of protecting the manufacturer to the utmost and granting, if any, few rights to, and the smallest possible protection of, the agent"

and (2) that such contracts may circumvent and defeat legislation directed at the correction of such abuses.

The Sales Agreement (R. pages 41-46) under consideration is declared by its terms to be a Michigan contract and governed by the laws of Michigan (R. page 45). We contend that the decision below is in conflict with the Michigan decisions.

Wordell vs. Williams (1886) 62 Mich. 50, 28 N. W. 796 at page 800:

> "It has been said that a *mere promise* to do an act in future is a sufficient consideration, even without performance, for an engagement by the other party. But the true principle underlying such doctrine is that the promise which forms the consideration will subject the party making it to a charge or obligation which he otherwise would not have incurred. By making it he must have incurred a liability to the party to whom it is made, in case he refuses to perform, for which such other party may have an action for damages. How otherwise can such promise amount to a consideration for the promise or agreement of the other party? A promise that cannot be

enforced either at law or in equity is a mere nudum pactum. * * *"

Bastian vs. J. H. DuPrey Company (1932) 261 Mich. 94, 245 N. W. 581, at page 581 of the N. W. Reporter:

"There is no question but in order to constitute a valid contract there must be mutuality of obligation. * * *"

We contend that the decision in question repudiates the law of consideration in contracts, and for that reason is untenable and contrary to the established authorities in this country.

RESTATEMENT OF CONTRACTS Sec. 32

"An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promise and performances to be rendered by each party are reasonably certain.

Comment:

* * * The law cannot subject a person to a contractual duty or give another a contractural right unless the character thereof is fixed by the agreement of the parties. A statement by A that he will pay B what A chooses is no promise. * * *"

Brooks vs. Federal Surety Co. (App. D. C. 1928), 24 F. (2d) 884, 57 A. L. R. 745.

This case involved an agreement to furnish coal at the price the plaintiff should sell it for less 10 per cent. The Court said the agreement in effect was a sale of coal to the plaintiffs "leaving it to them alone to determine the price to be paid for it." The court held the agreement void for lack of mutuality saying:

"Such an agreement lacks mutuality, and cannot be enforced.

"In Foster vs. Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171, the court says: 'An agreement for the sale of a quantity of iron ore, for a price per ton dependent upon that received by the vendee on its sale, lacks an essential ingredient of a contract of sale, and cannot be enforced.'

"In Weston Paper Mfg. Co. vs. Downing Box Co., 293 Fed. 725, it is held by the Circuit Court of Appeals, Seventh Circuit, that a contract for the sale of a large quantity of strawboard, to be delivered in monthly installments throughout a year, which authorized seller to fix the price for each three months' deliveries in advance, though it provided that such price 'shall be the seller's market price then existing,' is too indefinite to constitute a valid contract enforceable against the buyer. The court said:

'Plaintiff asserts, and the defendant denies, the validity of a sales agreement where the "market price" is determined, as here, by the seller. In fact it is urged that such a provision is not a "market price" in any proper sense of the term, *but is the seller's price, and brings the case squarely within the rule, announced in many cases, to the effect that an agreement which leaves the price to be fixed by the seller is too indefinite to be enforced and is void.* Williston, Sales §§ 37, 43, 464; Cold Blast Transp. Co. vs. Kansas City Bolt & Nut Co., 57 L. R. A. 696, 52 C. C. A. 25, 114 Fed. 77; American Cotton Oil Co. vs. Kirk, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; Crane vs. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869; United Press vs. New York Press Co., 164 N. Y. 406, 53 L. R. A. 288, 58 N. E. 527; Hoffman vs. Maffioli, 104 Wis. 630, 47 L. R. A. 427, 80 N. W. 1032; Joliet Bottling Co. vs. Joliet Citizens' Brewing Co., 254 Ill. 215, 98 N. E. 263; Velie Motor Car Co. vs. Kopmeier Motor Car Co., 114 C. C. A 284, 194 Fed. 324.

'Plaintiff, contending that the contract should be construed, if possible, so as to uphold it, insists that

it is neither unilateral nor uncertain, but governed by he maxim "id certum est quod certum reddi potest." * * * While so recognizing the rule for which plaintiff contends, we are unable to apply it to the facts in this case. We see nothing in this contract which takes from the seller the absolute right to fix the price in the future. Certainly defendant had no voice in fixing his price. Nor did any third party have any immediate influence upon plaintiff in determining the price. True, plaintiff may, in acting, have been governed by a desire to hold future business, or have been prompted by other laudable motives. But plaintiff could have arbitrarily changed the price each quarter, and from such arbitrary fixation defendant had no appeal. Upon the ground of uncertainty, and also for want of consideration, we conclude the agreement as drawn was unenforceable.'

"The contract in the instant case does not stipulate that the price of the coal shall be governed by the market price thereof, and the court cannot import such a provision into the contract. It is true that the plainiffs would not be permitted to make fraudulent sales for price-fixing purposes, but that rule cannot take the place of an agreement of the parties in regard to price.

"We need not refer to the numerous authorities cited by the parties, all of which have been examined by us, for we are convinced that the judgment of the lower court was right" (Italics ours).

Corthell vs. Summitt Thread Co. (1933), 132 Me. 94, 167 Atl. 79, 92 A. L. R. 1391 at page 1394 of A. L. R.

"If the contract makes no statement as to the price to be paid, the law invokes the standard of reasonableness, and the fair value of the services or property is recoverable. If the terms of the agreement are uncertain as to price, *but exclude the supposition*

> *that a reasonable price was intended, no contract can arise.* And a reservation to either party of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it as it is termed, merely illusory" (Italics ours).

The decision in question is contrary to the principles enunciated by the Circuit Court of Appeals for the Fourth Circuit in the case of *Motor Car Supply Company vs. General Household Utilities Company* 80 F. (2d) 167. On page 170 of the Federal Reporter the court states:

> "As the plaintiff was not bound to make deliveries under the contract, therefore, it was void for lack of mutuality in so far as it provided for future sale or purchase. The law is well settled that, where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be held binding upon the parties only to the extent that it has been performed. (Citing Cases) and, with respect to distributor's contracts, like that here under consideration, it is equally well settled that such a contract, which does not bind the manufacturer to sell and deliver, and which is terminable at will, imposes no liability upon him if he terminates it or refuses to make deliveries to the dealer. Ford Motor Co. vs. Kirkmeyer Motor Co., supra (65 Fed (2d) 1001) Jordan vs. Buick Motor Co. (C. C. A. 7th) 75 F. (2d) 447; * * *"

We contend that the decision is untenable and against public policy. Both parties to a contract should be bound or neither should be bound. It is against public policy to allow a manufacturer to sign up dealers on an agreement which places great and severe obligations on the dealers, but none on the manufacturer. The decision be-

low states that this was the avowed purpose of the respondent in drawing up the Sales Agreement under consideration. The decision below in effect holds that such an agreement deprives the petitioner of the protection of Section 218.01 of the Wisconsin Statutes which he otherwise would have.

For the reasons stated, it is submitted that the writ should be granted in this case.

Respectfully submitted,

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